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No. 207

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

LOUIS H. ROSENBLUM, MAX STRYK AND JACOB WEISS,

PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

ALBERT WARD,
PALMER K. WARD,
318 Insurance Bldg.,
Indianapolis, Indiana,
Market 0402,
Attorneys for Petitioners.

Central Publishing Company, Indianapolis, Ind.

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ARGUMENT

I

The brief of the United States, on pages 5 and 6, is in error in assuming that the Court of Appeals "rightly held on the prior appeal" that "the acquittal on the conspiracy charge does not warrant or require reversal of the convictions on the substantive charges." When the Court of Appeals considered the prior appeal, and made its decision on June 13, 1949, and denied petitions for rehearing on August 24, 1949 (176 F. (2d) 321), there was no issue before it upon which it could decide that the acquittal on the

conspiracy charge did not warrant or require reversal of the convictions on the substantive charges; it did not order such acquittal until January 31, 1950, when it amended its mandate of reversal and directed that a judgment of acquittal be entered as to the conspiracy indictment (R. 4), and the right to present such issue did not accrue to the defendants until after such acquittal was finally adjudged by the district court on February 20, 1950 (R. 8).

The statement on page 6 of the brief in opposition that the crimes of conspiracy and of wilfully attempted tax evasion are not identical, and that the substantive charges are not merged in the conspiracy, are not supported by the decision in Pinkerton v. United States, 328 U. S. 640, when applied to the particular facts presented in the present petition.

The *Pinkerton* case was not an income tax case; there was no judgment of acquittal involved; there was no issue of estoppel by such judgment of acquittal; the defendants were indicted on ten substantive counts and one conspiracy count for violations of sections 2810, 2833, 2834, 2803 and 3253 of the Internal Revenue Code; section 2810 requires the registration of distilling apparatus; section 2833 provides that it shall not be lawful for any person to carry on the business of a distiller without having given a bond, etc.; section 2834 directs that no mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law, etc. The defendants were convicted on substantive counts and also on the conspiracy charge.

Upon the facts in that case, applicable to the statutes involved, this Court held that there was no merger of the

substantive offenses in the conspiracy, and a conviction for the conspiracy could be had though the substantive offenses were completed, because the conspiracy charged had ingredients, as well as implications, distinct from the completion of the unlawful project. This was so because the crimes charged in the substantive offense counts were clearly different from the charge of conspiracy; a violation of Sections 2810 and 2834 involve neither wilfulness, nor an intent to defraud the United States.

Czarnecki v. United States, 95 F. (2d) 32, 35.

In deciding the Pinkerton case, reference was made to United States v. Rabinowich, 238 U. S. 78, where the Court said that "we have the typical case of a conspiracy that is in every way distinct from the contemplated crime that formed its object."

The facts in the *Pinkerton* and *Rabinowich* cases bear no resemblance to the facts which are set out in the Summary Statement of the Matter Involved (2-10, Petition), and such facts as stated therein are not controverted by the brief in opposition.

Under the particular facts in the present petition, we have the "identity of offenses which is fatal" that was recognized in the *Pinkerton* case. The government admitted that the acts and conduct by which the three defendants each attempted to defeat and evade his income and victory taxes for the year 1943 were substantially identical and grew out of many of the same transactions and that all of said defendants participated in many of the same acts and transactions and in the same series of acts and transactions constituting the four offenses charged (Exhibit 1, Transcript in former appeal, 60, 61, 62, 72); after the joint trial of the three defendants on the consolidated causes, the gov-

ernment urged that under the conspiracy indictment alone it would have been necessary for the government to prove substantially all of the material allegations of the three substantive offense indictments, and *that it proved the material allegations of the substantive offense indictment against each of the defendants as a necessary and integral part of the conspiracy indictment* (R. 55).

This had to be true because the consolidated trial was upon indictments for offenses which involved the essential elements of wilfully and knowingly attempting to defeat and evade income taxes by filing and causing to be filed the same alleged false and fraudulent income tax returns; the filing of the alleged false return of each defendant was particularly in issue in the conspiracy charge, because no other overt act was alleged to have been committed within the jurisdiction of the trial court (Overt Acts, Exhibit 1, Transcript in former appeal, 9-14); and, as the government admits, it grounded the prosecution of the four indictments upon the conspiracy charge, and proved the material allegations of the substantive offense indictments against each of the defendants as a necessary and integral part of the conspiracy indictment. These facts clearly distinguish our case from the *Pinkerton* case; these are admitted facts which conclusively prove that the basic facts in each trial were identical, and the core of the prosecutor's case was in each case the same; such facts being shown, the rights of the defendants must be protected by the decision of this Court in Sealfon v. United States, 332 U. S. 575.

On pages 6 and 7 of the brief in opposition it is said that "Since the present case involves judgments entered at a single trial, no question of *res judicata* is here presented." Defendants contend that such question is pre-

sented, and, if it is the intention of the United States to contend by this statement that such question of *res judicata* cannot be decided favorably to the defendants because the question arises out of judgments rendered against them in a joint trial wherein their several causes were consolidated for trial over their objections, such contention should present a strong reason for granting the writ, as it is a denial of due process, and a violation of legal rights, to consolidate criminal causes for trial over the objections of defendants and then deny them the right to plead a judgment of acquittal obtained in such consolidated trial as a bar, or as an estoppel, against other indictments for the same offense; the consolidation, over objection, cannot be used by the government to deprive the defendants of their constitutional and substantive legal rights. The United States cites no authority to support its position, but its present contention emphasizes the public importance of having a decision by this Court upon the unfairness which will result to defendants who are thus jointly tried, over their objections, and who are then deprived of their right to assert an acquittal in one of such consolidated causes as *res judicata,* or as an estoppel, against prosecution or punishment for the same offenses involved in such consolidated trial.

Under the facts in this case, it is a substantial injustice to the defendants to measure their rights by the decision in the *Pinkerton* and *Rabinowich* cases; the lower courts have erroneously misconstrued and relied upon the *Pinkerton* case; it is of public importance in the administration of federal criminal law that the writ prayed for be granted in order that this Court may make a proper distinction between the *Pinkerton* case and cases which involve facts similar to those shown in the present petition.

II

Respondent has treated question No. Three as presenting only the re-taxing of costs, which it says is warranted under Rule 36 of the Federal Rules of Criminal Procedure. It states that after the original conviction on both the conspiracy and substantive charges, the trial court ordered that the petitioners each pay one-third of the costs of prosecution of the four consolidated cases; that determination of the amounts was not made on the basis of taxation of costs separately in the four cases; it then says, "Instead, the clerk as a matter of convenience entered all costs reflecting the witness and marshal's fees in the one case in which the three petitioners were charged with conspiracy. This procedure, although achieving the correct practical result as long as all four convictions stood, *clearly became improper once the conspiracy conviction was set aside.*" (Emphasis added.)

The Clerk did nothing as a matter of convenience; the government based the prosecution of the four indictments on the evidence which it introduced in the conspiracy charge; it issued all of its subpoenas in the conspiracy charge; the Clerk taxed the costs in the causes in which such costs were created. Such procedure "Clearly became improper once the conspiracy conviction was set aside."

Such *impropriety* in the judgments was not such a clerical mistake as could be corrected under Rule 36; such procedure was an illegal increase in the punishment of each defendant; no increase in such punishment as to the substantive offenses could be made by the district court after the return to it of the mandate in said causes by the Court of Appeals.

Defendants respectfully urge that the writ should be granted as prayed for in their petition.

LOUIS H. ROSENBLUM,
MAX STRYK,
JACOB WEISS,

By

ALBERT WARD,
PALMER K. WARD,
318 Insurance Bldg.,
Indianapolis, Indiana,
Attorneys for Petitioners.

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SEPARATE AND SEVERAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ALBERT WARD,
PALMER K. WARD,
318 Insurance Bldg.,
Indianapolis, Indiana,
Market 0402,
Attorneys for Petitioners.

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(*Note: Petitioners have not filed a supporting brief.*)

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Petitioner, Appellant below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee below.

SEPARATE AND SEVERAL PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Your petitioners, Louis H. Rosenblum, Max Stryk and Jacob Weiss, hereinafter designated as defendants, separately and severally prays that a writ of certiorari issue

to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled causes on June 22, 1950.

I.

Summary Statement of the Matter Involved.

Each defendant is now imprisoned in the United States Penitentiary at Terre Haute, Indiana, where he was delivered by the United States Marshal on February 21, 1950, pursuant to a commitment issued upon a void judgment rendered against each defendant by the District Court of the United States for the Southern District of Indiana on August 23, 1948, Rosenblum in cause numbered 8829, Weiss in cause numbered 8830, and Stryk in cause numbered 8831, upon the Criminal Docket of said District Court.

Upon direct issue theretofore raised in a related cause of action (No. 8832 upon the Criminal Docket of the District Court for the Southern District of Indiana) where the essential facts and material issues involved in the instant cases were tried and finally determined in favor of each defendant, the United States Court of Appeals for the Seventh Circuit, on January 31, 1950, entered an order directing the acquittal of each defendant herein by amending its previous judgment of June 13, 1949 (R. 4), which called merely for a reversal of the conviction of the defendants in cause No. 8832. (Exhibit 1, Transcript in former appeal, 386, 398.) Pursuant to the mandate of the Court of Appeals, the District Court of the United States for the Southern District of Indiana, on February 20, 1950, entered its judgment of acquittal as to each defendant in cause 8832. (R. 8.)

After such judgment of acquittal by the District Court in cause 8832, and after each defendant was taken into

custody in the instant causes, each defendant, on February 20, 1950, in the cause affecting him, (Rosenblum in cause 8829, Weiss in cause 8830, and Stryk in cause 8831), filed a separate motion for himself to cancel the judgment of August 23, 1948, against him, and set aside the sentence therein imposed upon him, and asked for a discharge therefrom contending, amongst other allegations, that his acquittal in cause 8832 was:

1. *Res judicata;* and,

2. The Government was estopped by the judgment of acquittal in cause 8832 from proceeding further in causes 8829, 8830 and 8831, because the essential facts and pertinent and material issues in said causes (8829, 8830 and 8831) had been placed in issue in cause 8832, and by virtue of such judgment of acquittal, such facts and issues had been decided in favor of each defendant; and it was no longer legal or equitable to enforce such judgment and sentence in 8829, 8830 and 8831; and,

3. The judgments in causes 8829, 8830 and 8831 were void in that, amongst other things, it was sought in each of such cases to assess against each defendant one-third of three-fourths of the costs of cause 8832, of which each defendant had been absolved, exonerated and discharged by his acquittal in cause 8832. (Motion in the *Rosenblum* case, 8829, R. 9-25; Memorandum Brief in support of motion, R. 26-33; Service of motions on United States Attorney, and his Response in the Rosenblum case, R. 33, 34, 35.)

Four indictments had been returned involving the three defendants as follows: Rosenblum in cause 8829, Weiss in cause 8830 and Stryk in cause 8831, was charged with the substantive offense of attempting to defeat and evade his income and victory tax by filing, and causing to be filed, a false and fraudulent income tax return for 1943, in violation of Section 145 (b), 26 U. S. C.; in cause 8832, the three defendants were charged with having conspired to

attempt to evade and defeat the same income and victory tax of each defendant for the same year by filing, and causing to be filed the same alleged individual false and fraudulent tax returns. (Indictments: Rosenblum, Exhibit 1, Transcript in former appeal, 3, 8-14; Stryk, Exhibit 1, Transcript in former appeal, 7, 8-14; Weiss, Exhibit 1, Transcript in former appeal 5, 8-14.)

Each defendant entered a plea of not guilty as to each charge against him (Exhibit 1, Transcript in former appeal, 27, 28, 29); a jury was waived (Exhibit 1, Transcript in former appeal, 72) and the four causes were consolidated for trial on the motion of the United States Attorney, over the objection of the defendants, upon the representation of the United States Attorney that:

> "Since the acts and conduct by which the defendant Rosenblum in criminal cause No. 8829, the defendant Weiss in criminal cause No. 8830, and the defendant Stryk in criminal cause No. 8831, each attempted to defeat and evade his income and victory taxes for the year 1943 were substantially identical and grew out of many of the same transactions, and since the evidence will show that all three of said defendants participated in many of the same acts and transactions and in the same series of acts and transactions constituting the offenses charged, these are proper cases of consolidation." (Exhibit 1, Transcript in former appeal, 60, 61, 62, 72.)

The four cases were tried together upon the government's theory that during the calendar year 1943, the defendants realized a large amount of income from over-ceiling sales of liquor for which they wilfully failed to account in their individual tax returns; the only item in dispute was the one which was labeled "Dividends" in the substantive indictments, and it was the position of the government that such item represented money received by the defendants from a partnership or joint venture, in

which all three had participated, and the defendants were tried and convicted by the District Court in all of the four causes as partners engaged in such joint venture or enterprise, from which the government claimed they received money which was not accounted for in their individual tax returns. (Exhibit 1, Transcript in former appeal, 276, 398, 399.)

The basic and crucial facts introduced in evidence and relied upon by the government to obtain and sustain a conviction of each and all of the defendants on the conspiracy charge were likewise relied upon by it to obtain and sustain the conviction of each defendant on the substantive charges. The government urged that:

> "Consequently upon the trial of the three defendants under the conspiracy indictment alone it would have been necessary for the government to prove substantially all of the material allegations set forth in each of the three substantive offense indictments, therefore, having once proved the material allegations of the substantive offense indictment against each of the defendants as a necessary and integral part of the conspiracy indictment, it was not only harmless but the only practical procedure to try all the cases at one time and thus avoid a multiplicity of trials." (R. 55.)

There was an identity of the subject matter in each and all of said actions as thus consolidated; there was an identity of the causes of action, the parties thereto, and of the capacity in which such parties appeared as litigants; the actions were related, and were integrated by the government into one cause of action. In the trial of said indictments, the government distinctly placed in issue as to each and every of said causes, and as to each and all of said defendants, all of the facts, and the entire group of facts, which were relied upon by it in each of said causes to obtain and sustain a conviction of each defendant as to each indictment against him.

After the government had rested its case, and at the close of all of the evidence in the joint trial, each defendant filed a separate motion for acquittal as to each offense charged against him because the evidence was insufficient to sustain a conviction of the offense charged in the indictment. Each motion was overruled. (Rosenblum, Exhibit 1, Transcript in former appeal, 269, 272, 273, 274, 283, 284; Stryk, Exhibit 1, Transcript in former appeal, 270, 273, 274, 283, 284; Weiss, Exhibit 1, Transcript in former appeal, 270, 272, 273, 274, 283, 284.)

On the substantive charges each defendant was committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years, fined $10,000, and assessed with one-third of the costs in all four cases. (Rosenblum, Exhibit 1, Transcript in former appeal, 295, 296; Stryk, Exhibit 1, Transcript in former appeal, 297; Weiss, Exhibit 1, Transcript in former appeal, 296, 297.)

In the conspiracy case each defendant was sentenced to imprisonment for a period of two years, to begin at the expiration of the sentence on the substantive charge, fined $10,000, and ordered to pay one-third of the costs in the four cases. (Exhibit 1, Transcript in former appeal, 298, 299.)

Each defendant appealed from such convictions to the United States Court of Appeals for the Seventh Circuit, and on June 13, 1949, such court affirmed the convictions in causes 8829, 8830 and 8831, and reversed the conviction of all defendants in cause 8832 (Exhibit 1, Transcript in former appeal, 386-402), and on January 31, 1950, amended its judgment as to the indictment charging conspiracy, and directed that a judgment of acquittal be entered as to said indictment; such acquittal was upon the merits. (R. 4.)

The defendants petitioned for certiorari in causes 8829,

8830 and 8831, which petitions were denied by this Court, 338 U. S. 893, and rehearing denied, 338 U. S. 940.

The mandates of the Court of Appeals in the four cases were received in the District Court on February 3, 1950 R. 2, 3, 4); on February 20, 1950, each defendant was acquitted by the District Court as to the indictment charging conspiracy, such acquittal following the mandate of the Court of Appeals (R. 8); afterwards, but on the same date, a commitment was issued for defendant Rosenblum in cause 8829, Weiss in cause 8830 and Stryk in cause 8831 (R. 8, 9) and each defendant was thereupon taken into custody by the United States Marshal in obedience to such commitment by virtue of such respective judgments of August 23, 1948, in 8829, 8830 and 8831, and ordered by the court taken to the detention room or other place of detention to await transportation to the place of confinement to be designated by the Attorney General for the serving of the sentences (R. 38, 39), and on the same date they were incarcerated in the Marion County Jail where they were held until taken to the penitentiary on February 21, 1950. (R. Rosenblum, 69; Stryk, 77; Weiss, 85.)

After the defendants were thus prisoners in custody under such sentence of said District Court, each claimed the right to be released upon the ground that the said sentence was imposed against him in violation of the Constitution and laws of the United States, and that the court was without jurisdiction to impose such sentence, and that the sentence was in excess of the maximum authorized by law, and was otherwise subject to direct and collateral attack, and Rosenblum in cause 8829, Weiss in cause 8830 and Stryk in cause 8831, each filed his separate verified motion in said District Court which imposed such sentence to vacate and set aside the judgment against him of August 23, 1948, aforesaid, and vacate and set aside the sentence therein against him. (R. 38, 39, 40.) (Rosenblum motion, R. 9-25.)

Such motions are authorized by Section 2255, Title 28 U. S. C. They brought to the court's attention the factual situation that at the time the judgments were rendered in causes 8829, 8830 and 8831, the defendants were entitled to an acquittal in said causes, because, in cause 8832 the evidence was insufficient to convict, and they were entitled to plead such acquittal as a defense to said substantive charges; that the trial court, when it rendered the judgments complained of, was not cognizant of the fact that defendants were entitled to such acquittal, and the defendants were deprived of an earlier opportunity of presenting their defenses based upon these facts.

The motions show that the cases were tried and defendants were convicted as partners in a joint enterprise designed to attempt to defeat and evade their income taxes; that the offenses charged were the same; that the parties were the same, and impleaded in the same capacities; that the cases were consolidated and tried together over the objections of defendants; that in the conspiracy charge the government distinctly put in issue all of the essential and material allegations of each substantive indictment; that the demands in all the cases were the same; that the cases were all related causes of actions where the government distinctly placed in issue in the conspiracy charge all the facts it had as to the substantive charges; that a trial upon the merits resulted in an acquittal of each defendant on the conspiracy, and such acquittal is *res judicata,* and an estoppel by judgment, against the government, and prevents it from either prosecuting or punishing the defendants on the substantive charges; that the attempt of the government to thus punish defendants is a violation of their rights under the Fifth Amendment to the United States Constitution; that it is a violation of the due process clause, and results in placing them twice in jeopardy for the same offense; that there is an irreconcilable in-

compatibility and repugnancy between the judgment of acquittal in 8832 and the judgments of conviction in 8829, 8830 and 8831, and the judgments of convictions are void; that the sentence in each of said judgments is void as it exceeds the punishment authorized by law, in that the court attempted to assess each defendant with one-third of three-fourths of the costs of $2,193.88 in 8832, when each already had been assessed the maximum fine of $10,000 and costs in each case, and ordered to pay one-third of the costs in each other's case, and defendants could not be ordered to pay such costs in cause 8832; the motion avers that defendants had no opportunity to present such facts to the court until after their acquittal on February 20, 1950, and by reason of their acquittal in cause 8832 it is no longer legal or equitable to enforce the judgments against them in causes 8829, 8830 and 8831. (Rosenblum motion, R. 9-25.)

Each of the foregoing motions was served on the United States Attorney; he appeared in each cause and filed a response thereto. (R. 33, 34, 35.)

A joint hearing on the motions and responses was had before the District Court on February 20, 1950 (R. 40); on February 21, 1950, the court made and filed its special findings of facts and conclusions of law, upon which it entered an order denying the motion in each case. (R. 61, 62, 63, 64.)

On February 21, 1950, after each defendant had begun the service of his sentence in causes 8829, 8830 and 8831, the District Court, of its own motion,

> "ordered that the items of cost taxed in the conspiracy case, No. 8832, as follows:
>
> Clerk's costs, $65.10 and the attorneys' fee of $20.00 are eliminated and cancelled; that the items aggregating $2,158.88 in said cause No. 8832 consisting of U. S. Marshal's fees of $126.38 and witness fees of $2,032.50, be retaxed as follows:

One-fourth thereof is hereby retaxed as costs in No. 8832 and, in view of defendant's acquittal therein, defendants are relieved and discharged from any and all liability therefor.

It is further ordered that the other three-fourths of said sum of $2,158.88 be retaxed as costs as follows:

One-third of said three-fourths of said sum shall be retaxed as costs and added to the costs now taxed against each defendant in causes No. 8829, 8830 and 8831." (R. 64, 65.)

From such orders of the District Court of February 21, 1950, each defendant took a separate appeal to the United States Court of Appeals for the Seventh Circuit (R. 66, 67, 74, 75, 82, 83); a stipulation was filed in the Court of Appeals, approved by it, that there should be but one printing of the Record; that the Exhibits need not be printed; that the motions to cancel the judgment and set aside the sentence in causes 8829, 8830 and 8831, and brief attached thereto, and the responses thereto, were identical in form and substance, except as to the number of the cause and name of the defendant, and in printing the Record it would be sufficient to print the motion as filed by defendant Rosenblum in Cause No. 8829, and the plaintiff's response thereto, and each of the defendants, and the United States, may proceed upon the one printing of said matters in the Court of Appeals as though each of said motions, and the responses thereto, had been printed separately in the Record. (R. 95, 96, 97.)

On June 22, 1950, the Court of Appeals affirmed the decision and judgment of the District Court (R. Rosenblum, 106; Stryk, 107; Weiss, 108), its decision has not been officially reported, but is set out on pages 102-106 of the Record. The findings, conclusions and judgment of the District Court have not been officially reported but they are set out on pages 61-65 of the Record. The mandates were stayed on June 30, 1950. (R. 109.)

II.

Basis of Supreme Court's Jurisdiction.

The judgment of the United States Court of Appeals was entered on June 22, 1950. (R. 106, 107, 108.) No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1), and Rules 37 (b) and 45 (a) of the Federal Rules of Criminal Procedure.

III.

Questions Presented.

ONE.

On the particular facts in these cases, Is the defendant Rosenblum in cause 8829, defendant Weiss in cause 8830, and defendant Stryk in cause 8831, entitled to be acquitted because of his acquittal in cause 8832, on the theory that the judgment of acquittal in cause 8832 was a determination by such judgment favorable to each defendant of the facts essential to conviction on the substantive offense charged in 8829, 8830 and 8831?

TWO.

On the particular facts in these cases, Is the defendant Rosenblum in cause 8829, Weiss in cause 8830, and Stryk in cause 8831, entitled to have the judgment of conviction against him of August 23, 1948, set aside so that he may plead his judgment of acquittal in cause 8832 as *res judicata*, estoppel by judgment, or double jeopardy, as a bar, or as a defense, to the indictments in 8829, 8830 and 8831?

THREE.

Could the District Court, on February 21, 1950, add to the sentence against defendant Rosenblum in cause 8829, Weiss in cause 8830 and Stryk in cause 8831, one-third of three-fourths of the costs taxed in cause 8832 ($539.72 to each), after each had been acquitted in cause 8832, and after each had commenced the service of his sentence, Rosenblum in cause 8829, Weiss in cause 8830 and Stryk in cause 8831?

IV.

Reasons Relied on for Allowance of the Writ.

QUESTIONS ONE AND TWO.

1. The government claimed that it proved the material allegations of the substantive offense indictment against each defendant as a necessary and integral part of the conspiracy indictment. (R. 55.) The basic facts in each trial were identical; the core of the prosecutor's case was in each case the same, and the judgment of acquittal on the conspiracy trial in cause 8832 was a determination favorable to each defendant of the facts essential to his conviction of the substantive offense charged in causes 8829, 8830 and 8831; such judgment of acquittal in the conspiracy trial became *res judicata* as to said substantive offenses. The decision of the Court of Appeals in denying defendants the rights which accrued to them by virtue of such judgment of acquittal in cause 8832, is a decision by it on a federal question which is in conflict with the applicable decision of this Court in *Sealfon* v. *United States*, 332 U. S. 575, 578, 579, 580, wherein it was recognized that the commission of the substantive offense and a conspiracy to commit it are generally separate and distinct offenses, and with some exceptions, one may be prosecuted for both

crimes, but the Court decided that *res judicata* may be a defense in a second prosecution, and said:

> "But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (*United States* v. *Oppenheimer*, 242 U. S. 85, 87, 37 S. Ct. 68, 69, 61 L. Ed. 161, 3 L. R. A. 516; *United States* v. *DeAngelo*, 3 Cir., 138 F. 2d 466, 468; *Harris* v. *State*, 193 Ga. 109, 17 S. E. 2d 573, 147 A. L. R. 991; see *Frank* v. *Mangum*, 237 U. S. 309, 334, 35 S. Ct. 582, 590, 59 L. Ed. 969) and operates to conclude those matters in issue which the verdict determined though the offenses be different. See *United States* v. *Adams*, 281 U. S. 202, 205, 50 S. Ct. 269, 74 L. Ed. 807."

In our cases, the defendants were tried in the four causes upon the theory that each aided and abetted the other in attempting to defeat his tax; as the cases were tried, the issues were the same; and the United States Attorney urged below that *the government proved the material allegations of the substantive offense indictment against each defendant as a necessary and integral part of the conspiracy indictment* (R. 55); the defendants were acquitted on that charge, and, under the authority of the *Sealfon* case, the judgments in 8829, 8830 and 8831 should be set aside and the defendants discharged, or, defendants should be entitled to plead, or offer in evidence, in said causes, the judgment of acquittal in 8832, as *res judicata.*

2. The Court of Appeals erroneously based its judgment upon the decision of this Court in *Pinkerton et al.* v. *United States*, 328 U. S. 640; neither *res judicata* nor estoppel by judgment was in issue in that case, and it cannot be used as an authority to support the judgment of the lower courts.

The decision of the Court of Appeals has not given proper consideration to the effect of the judgment of acquittal in cause 8832, and consequently its decision is a

decision by it upon a federal question which is in conflict with applicable decisions of this Court in the cases of:

United States v. *Oppenheimer,* 242 U. S. 85; *Jeter* v. *Hewitt,* 22 Howard 352, 363; *Heiser* v. *Woodruff,* 327 U. S. 726, 735; *Cromwell* v. *County of Sac,* 94 U. S. 351; *Helvering* v. *Mitchell,* 303 U. S. 391; *Jackson, Attorney General* v. *Irving Trust Co.,* 311 U. S. 494, and *Southern Pac. R. Co.* v. *United States,* 168 U. S. 1; which hold that a right, question, or fact distinctly put in issue, in a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so placed in issue must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains; that whether a particular issue was actually litigated is immaterial if there was full opportunity to litigate it, and the judgment is *res judicata* as to all relevant issues which could have been raised and litigated in such suit; that where a defendant has been acquitted upon the merits in a criminal cause, such acquittal may be pleaded in bar to any subsequent prosecution for the same offense, and the government may not put him in jeopardy nor prosecute him a second time; that the maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth; it becomes *res judicata,* and no other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy.

3. The fraudulent acts and attempts and intents to defraud, and the filing of the alleged false and fraudulent tax returns, which were placed in issue in the conspiracy trial in 8832, and which were covered by the finding and

judgment of acquittal, embraced all of the essential acts, attempts and intents to defraud alleged in the substantive offense charges in 8829, 8830 and 8831, including the filing of the same alleged false and fraudulent returns, and such acquittal is, as a plea, a bar, or, as evidence, conclusive between the government and the defendants, and prevents conviction or punishment in causes 8829, 8830 and 8831; the failure of the Court of Appeals to so adjudge is a decision by it of a federal question which is in conflict with the applicable decision of this court in *Coffey* v. *United States,* 116 U. S. 436, 442, 443, 444, 445; which holds that an acquittal on a criminal information against a defendant, where the information charged certain fraudulent acts and attempts and intents to defraud the government out of taxes by the possession and use of property for the distilling of liquor, was conclusive as a prior judgment against the United States in its later suit to adjudge a forfeiture of such property based upon the fraudulent acts and attempts and intents to defraud which were involved in the prior criminal information, as such matters were embraced within and covered by the verdict and judgment of acquittal, and the facts could not again be litigated between the parties. See also *Sealfon* v. *United States,* 332 U. S. 575; *United States* v. *Moser,* 266 U. S. 236; *United States* v. *Rachmil,* 270 F. 869, 871 (D. C., S. D., N. Y.); *United States* v. *Clavin,* 272 F. 985 (D. C., E. D., N. Y.).

4. The decision of the Court of Appeals that the conspiracy indictment was good as against the attack made upon the ground that it was practically identical to the indictment for the substantive offense (R. 103), and for that reason the judgment in cause 8832 could not be pleaded, or offered, as *res judicata* or as an estoppel by judgment in 8829, 8830 and 8831, is a decision by it of a federal question contrary to the applicable decision of this

Court in *United States* v. *Adams,* 281 U. S. 202, 205. This case holds that *res judicata* is a defense in a second prosecution and operates to conclude those matters in issue which the judgment of acquittal determined though the offenses be different. See also *Sealfon* v. *United States,* 332 U. S. 575.

5. Each defendant is constitutionally entitled to a trial *de novo* of the facts alleged and offered in support of each offense charged against him and to an independent finding and judgment with respect thereto; "a rule of evidence" is recognized which accords to each defendant the right to claim finality with respect to a fact, or a group of facts, determined in his favor; the Court of Appeals erred in not deciding that the judgments should be set aside so that defendants could plead their acquittal in cause 8832 as an estoppel by judgment against the government from conviction or punishment in 8829, 8830, 8831, as to every fact, or group of facts, decided in their favor by the acquittal in 8832; in so doing it has rendered a decision upon an important question of federal law in violation of the due process clause of the Fifth Amendment to the United States Constitution, and in conflict with the applicable decision of this Court in *Hans Nielsen, Petitioner,* 131 U. S. 176, 188, and in conflict with the decision of the Third Circuit in *United States* v. *DeAngelo,* 138 F. 2d 466, 468, where the Court says:

> "The conclusiveness of a fact which has been competently adjudicated by a criminal trial is not confined to such matter only as is sufficient to support a plea of double jeopardy. Even though there has been no former acquittal of the particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined. Cf. *United States* v. *Adams,* 281 U. S. 202, 205, 50 S. Ct. 269, 74 L. Ed. 807. The matter is one of collateral estoppel of the prosecutor. Nor can

there be any requirement of mutuality with respect to a criminal judgment's conclusiveness. An accused is constitutionally entitled to a trial *de novo* of the facts alleged and offered in support of each offense charged against him and to a jury's independent finding with respect thereto. But a 'rule of evidence' has been recognized 'which accords to the accused the right to claim finality with respect to a fact or group of facts previously determined in his favor upon a previous trial.' See *United States* v. *Carlisi,* D. C. E. D. N. Y., 32 F. Supp. 479, 482."

6. Clearly, questions One and Two are of public importance in the administration of federal criminal law; the procedure in these causes accentuates the grave danger which will be encountered by every defendant who is charged with a substantive offense, to which is added a conspiracy with others to commit such offense; especially is this true where defendants are indicted separately, but tried jointly, over their objections, in a consolidated cause, where they are denied the opportunity of availing themselves of the defense of *res judicata,* estoppel by judgment, and double jeopardy, which grow out of or result from such consolidated trials; such procedure constitutes a serious threat to fairness in the administration of justice; it adds an additional danger to those who are thus subjected to trial, and creates a peril in such cases which was not included within the hazards pointed out by this Court in *Krulewitch* v. *United States,* 336 U. S. 440 (concurring opinion by Mr. Justice Jackson, 445-448), in discussing the joinder of an indictment for a substantive offense with a conspiracy to commit such offense, as the jeopardy involved in the proceedings below which gave rise to the questions presented will violate the constitutional rights of all defendants similarly affected, in addition to transgressing their rights as determined by substantive law.

The settlement of our questions by this Court is plainly in the public interest; the lower courts have erroneously failed to apply the applicable decisions of this Court, and the decision below is in conflict with the decision of the Third Circuit in *United States* v. *DeAngelo,* 138 F. 2d 466, on the same matter.

Question Three.

1. Indiana has the following statutory provision as to costs on acquittal in criminal cases:

> "When a defendant is acquitted in a criminal action, he shall not be liable for costs, except when otherwise provided in this act." Burns Revised Statutes of Indiana, 1933, Replacement Volume 4, Section 9-1826.

There is no comparable federal statute upon this matter, and the rights of the defendants to be relieved from the payment of costs in cause 8832 are governed by such Indiana Statute.

The decision of the Court of Appeals has thus decided an important question of local law in conflict with such local statute, and in conflict with the applicable local decisions of the Supreme Court of Indiana in *Smith* v. *State,* 5 Ind. 541, which holds that where there is a reversal of a judgment of conviction in a criminal cause, and such reversal orders the defendant acquitted, the defendant cannot be taxed with any costs; the decision of the Court of Appeals is in conflict with the local decision in *Burch* v. *Dooley,* 123 Ind. 288, that a defendant cannot be liable for costs in a cause after it has been found that he was not guilty in such cause, and the attempt to transfer costs from a cause in which defendant was acquitted, to a cause in which he was convicted, *was a nullity,* and the incorporation of such costs in the judgment which carried conviction, *was a nullity.*

2. The court had no power, upon its own motion, to enter an order on February 21, 1950, taxing each defendant with $539.72 of the costs originally taxed in cause 8832 (R. 64, 65); each defendant had commenced the service of his sentence on February 20, 1950 (R. 9, 39, 40), and neither sentence could be legally enlarged by adding such amount to the judgments of August 23, 1948; such procedure was an illegal second punishment on the finding of August 23, 1948; it was an unconstitutional attempt to increase such original punishment beyond the maximum fine of $10,000 as authorized by Section 145 (b), 26 U. S. C., and such action is prohibited by the Fifth Amendment to the United States Constitution; it was a decision of the Court of Appeals contrary to such constitutional provision, and is a decision by it on a federal question in conflict with the applicable decision of this Court in *Ex Parte Lange,* 18 Wall. 163, 167-178, which holds that the general power of a court over judgments rendered cannot be so used as to violate the constitutional guaranty against double punishment; and the decision in *United States* v. *Benz,* 282 U. S. 304, which holds that a sentence cannot be amended so as to increase the punishment after the defendant has already partly suffered the punishment originally prescribed.

3. The Court of Appeals attempts to justify the transfer and addition of such costs in cause 8832 to causes 8829, 8830 and 8831 upon the theory that in the original judgments in said causes the court had ordered that each defendant should pay one-third of the costs in 8832 (R. 104); the Court of Appeals has overlooked the law which provides that the transfer of costs from one cause to another, and incorporating them with the judgment in the other, was a nullity in the judgments of August 23, 1948. *Burch* v. *Dooley,* 123 Ind. 288, 290.

4. The Court of Appeals says that the clerk committed the error of failing to tax the individual liability of the

defendants for one-third of the costs in the other cases as required by the sentences imposed, and therefore such mistake or error could be corrected by the district judge at any time under Rule 36, Federal Rules of Criminal Procedure. (R. 104.) Rule 36 does not give the district judge any power or authority to breathe any life into that part of the judgments of August 23, 1948, relating to the requirement that each defendant pay one-third of the costs in the four cases, as such parts of said judgments were null and void when originally made; the decision of the Court of Appeals is a misconception and misapplication by it of Rule 36.

5. The Record shows that all of the subpoenaes were issued in cause 8832, and that the marshal's fees and witness' fees in that cause aggregated the $2,158.88, three-fourths of which is now complained of. (R. 56, 57, 64 and Exhibit 9.) Consequently, the clerk made no mistake in taxing such items of costs to cause 8832; he was only a ministerial officer who did his duty and taxed the costs in the cause of action wherein such costs were incurred, which was 8832; the acquittal of the defendants clearly exonerated them from paying costs taxed or incurred in that cause.

6. The Court of Appeals says that the retaxation of costs involved no element of increase, but rather a decrease, in defendants' liability or punishment, "since the sentences always included the provision that each defendant pay one-third of the aggregate of the costs in all the cases" (R. 105); such provision in the judgments has always been void; *Burch* v. *Dooley,* 123 Ind. 288, 290; but if not void *ab initio,* such provisions were nullified by the acquittal. Burns Revised Statutes of Indiana, 1933, Replacement Volume 4, Section 9-1826; *Smith* v. *State,* 5 Ind. 541.

7. The Court of Appeals says that in addition to the

terms of imprisonment and fines, the district court, in imposing its sentences upon the defendants, exercised the discretion reposed in it under 28 U. S. C. 1940 Ed., Section 822, (now 1918) and ordered that the defendants each pay one-third of the costs of the prosecution of the four cases (R. 104); but this statute gave the district court no such discretion; it only authorized the court, in its discretion, to award that the defendants should pay the costs of prosecution, which means the costs of the prosecution in the cause in which he is convicted; costs in criminal proceedings are a creature of the statute, and the decision of the Court of Appeals in approving the addition of such costs to causes 8829, 8830 and 8831 under Section 822, pursuant to Rule 36, is a decision by it of a federal question in conflict with the applicable decision of this Court in *Phillips* v. *Gaines,* 131 U. S. Appendix clxix.

Neither Section 822, nor Rule 36, authorized the court to "award that the defendant shall pay the costs of prosecution" in a cause where he was acquitted. The taxation of costs is a judicial act, and before the adoption of Section 822, 28 U. S. C., federal courts could not adjudge payment of costs. *Whitworth* v. *United States,* 114 F. 302, 304 (8 C. A.). Defendants cannot be assessed with costs in a case where they were acquitted; *United States* v. *Wilson,* 193 F. 1007 (C. C. S. D. N. Y.); *United States* v. *Miller,* 223 F. 183 (D. C. S. D. Georgia).

8. Question Three is of exceptional public importance, because it may arise in every criminal prosecution; ordinarily, it would only arise in cases of conviction; but in the present cases, it involves substantial costs being transferred from a cause where the defendants were acquitted to causes in which they were convicted; the transfer of costs from a cause in which a defendant has been acquitted, to a cause where he was convicted, is a violation of a positive State Statute, and is a nullity in Indiana;

furthermore, the question calls for construction by this Court of its Rule 36, Federal Rules of Criminal Procedure, as to a very material matter of judicial power which was wrongfully exercised by the lower court, and where it improperly construed and misapplied such Rule; the lower court also misconstrued and misapplied Section 822, Title 28 U. S. C., and a decision by this Court is vital to settle the existing conflict between the disputed decision and the applicable local statute and decisions in Indiana, and to determine and limit the jurisdiction and authority of all District Courts as to the increase of punishment under the guise of transferring costs from a cause in which a defendant has been acquitted, and adding them to a sentence of conviction in another cause, after the defendant has commenced the service of his sentence in such cause of conviction.

Wherefore, your petitioners separately and severally prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit commanding said court to certify and send to this Court, on a day to be designated, a full and complete Transcript of the Record and all proceedings of said Court of Appeals had in these causes, to the end that these causes may be separately and severally reviewed and determined by this Court; that the several judgments of the Court of Appeals against each defendant be reversed; that each petitioner be discharged, or granted such relief as may seem proper.

Dated: Indianapolis, Indiana, July 19, 1950.

LOUIS H. ROSENBLUM,
MAX STRYK,
JACOB WEISS,
By: ALBERT WARD,
PALMER K. WARD,
318 Insurance Bldg.,
Indianapolis, Indiana,
Attorneys for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 207

LOUIS H. ROSENBLUM, MAX STRYK AND JACOB WEISS, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 102-106) is not yet reported. The opinion of that court on the prior appeal is reported at 176 F. 2d 321.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1950. (R. 106-108.) The petition for a writ of certiorari was filed on July 19,

1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether their acquittals on a conspiracy charge resulted in determinations favorable to petioners of facts essential to, and hence required reversal of, their convictions on substantive charges.

2. Whether the trial court erred in re-taxing costs.

STATUTES AND RULE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

Criminal Code:

> Section 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.
> (18 U. S. C. 1946 ed., Sec. 88.)

Federal Rules of Criminal Procedure:

> Rule 36. *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

STATEMENT

On September 19, 1947, each of the petitioners was charged in a separate indictment with wilfully attempting to evade and defeat a large part of his income and victory tax for the calendar year 1943. (R. 10, 102-103.) In addition, a fourth indictment jointly charged all of the petitioners with conspiring to commit the substantive offenses. (R. 103.) Three of the overt acts alleged in the conspiracy indictment were that each petitioner filed a false and fraudulent tax return for 1943. (R. 11.)

The four indictments were consolidated for trial; a jury was waived; trial was had before the

court and a judgment of conviction was entered on each of the four indictments. Each petitioner was sentenced to three years imprisonment and a fine of $10,000 on the substantive charge and a further fine and imprisonment was imposed on the conspiracy charge. On appeal, the convictions on the three substantive indictments were unanimously affirmed, but the conviction on the conspiracy indictment was reversed by a divided court, 176 F. 2d 321. Petitions for a writ of certiorari were denied, 338 U.S. 893, rehearing denied, 338 U.S. 940. Thereafter, the Court of Appeals amended its order by directing a judgment of acquittal on the conspiracy charge, and such a judgment was accordingly entered by the district court. After commitment on the substantive charges, each petitioner filed in the trial court a motion to cancel void judgment and set aside illegal sentence (R. 9). Each motion was denied. (R. 64.)

The original judgments had ordered each defendant to pay one-third of the costs of prosecution of the four cases. The ascertainment of such fractional amounts was not made on the basis of the taxation of costs separately in each of the four cases. Instead, the clerk ascertained the costs reflecting the witness and marshal's fees and entered the same in the one case in which the three petitioners were charged with conspiracy. (R. 104.) In denying the motions referred to above the trial

court also entered the following orders re-taxing costs (R. 64-65):

> It is ordered that the items of costs taxed in the conspiracy case, No. 8832, as follows: Clerk's costs, $65.10 and the attorneys' fee of $20.00 are eliminated and cancelled; that the items aggregating $2,158.88 in said cause No. 8832, consisting of U. S. Marshal's fees of $126.38 and witness fees of $2,032.50, be retaxed as follows: one-fourth thereof is hereby retaxed as costs in No. 8832 and, in view of defendants' acquittal therein, defendants are relieved and discharged from any and all liability therefor.
>
> It is further ordered that the other three-fourths of said sum of $2,158.88 be retaxed as costs as follows: One-third of said three-fourths of said sum shall be retaxed as costs and added to the costs now taxed against each defendant in Causes No. 8829, 8830 and 8831.

Petitioners again appealed to the Court of Appeals which affirmed the orders of the District Court denying the motion of each petitioner to cancel the judgment of conviction against him, as well as the order correcting the taxation of costs. (R. 106.)

ARGUMENT

I

As the Court of Appeals rightly held on the prior appeal, and again on this appeal, the acquittal on the conspiracy charge does not warrant or re-

quire reversal of the convictions on the substantive charges. The crimes of conspiracy and of wilfully attempted tax evasion are not identical; nor are the substantive charges merged in the conspiracy. *Pinkerton* v. *United States,* 328 U. S. 640. The gravamen of a conspiracy charge is the agreement to commit unlawful acts (*United States* v. *Rabinowich,* 238 U. S. 78, 88); the gist of the offenses under Section 145(b) of the Internal Revenue Code, *supra,* was the wilful attempt to evade and defeat taxes. Moreover the opinions of the Court of Appeals show that the acquittal on the conspiracy charge was rested on the holding that statements and acts of the defendants, occurring after the termination of the alleged conspiracy, were inadmissible to prove conspiracy, although clearly competent on the substantive charges as admissions against interest by the particular individual making them. Any contention of inconsistency in result or of error on evidentiary matters could have been raised on rehearing in the Court of Appeals or on the petition to this Court on the first appeal.[1]

Sealfon v. *United States,* 332 U. S. 575 does not support the petitioners' contention. Since the

---

[1] Indeed, in their prior petition, petitioners contended, *inter alia,* that

> The reversal by the Court of Appeals of the convictions on the conspiracy indictment automatically rules out the mass of evidence admitted into the Record solely because of the claim of conspiracy. Absent such testimony no evidence is left to support the convictions.

Petition in Nos. 368-70, 1949 Term, p. 15.

present case involves judgments entered at a single trial, no question of *res judicata* is here presented. Moreover, application of the doctrine of *res judicata* in the *Sealfon* case, foreclosing prosecution on the substantive charge after acquittal on a conspiracy charge, turned on the unique circumstances which prompted this Court to hold (p. 580) that the "basic facts in each trial were identical" and that the proceedings on the substantive offense constituted "a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent." No such identity of basic facts between the conspiracy and substantive charges exists here.

II

The re-taxing of costs by the trial court likewise provides no basis for the issuance of a writ of certiorari. After the original conviction on both the conspiracy and substantive charges, the trial court ordered that the petitioners each pay one-third of the costs of prosecution of the four consolidated cases. Determination of the amounts was, however, not made on the basis of taxation of costs separately in each of the four cases. Instead, the clerk as a matter of convenience entered all costs reflecting the witness and marshal's fees in the one case in which the three petitioners were charged with conspiracy. This procedure, although achieving the correct practical result as

long as all four convictions stood, clearly became improper once the conspiracy conviction was set aside. Accordingly, the trial court took the corrective action of fixing the liability for costs individually in the substantive cases as originally intended, with allowance for the conspiracy acquittal. (R. 105.) The re-taxing of costs in the circumstances of this case was fully warranted under Rule 36 of the Federal Rules of Criminal Procedure, *supra,* which provides that clerical mistakes in judgments and orders may be corrected at any time.

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

ARNOLD RAUM,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
GEORGE R. GALLAGHER,
Special Assistants to the Attorney General.

AUGUST, 1950.

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